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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DR. ERNEST B. TERRELL, ET AL, Petitioner

v.

LAMAR ALEXANDER, ET AL., Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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19 pp

QUESTION PRESENTED

Whether a named class representative whose claim on the merits has become moot and who no longer has a personal stake in the outcome of the litigation, nevertheless has standing to pursue the merits of the class claim.

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The Respondents, original plaintiffs in the proceedings below, respectfully submit that the Petition for a Writ of Certiorari filed by Petitioner Terrell, seeking review of the June 12, 1986, Order of the United States Court of Appeals for the Sixth Circuit, dismissing Petitioner's appeal, should be denied.

STATEMENT OF THE CASE

This lawsuit was filed on May 21, 1968, pursuant to 42 U.S.C. § 2000c-2000c-9, §§ 401-410 of the Civil Rights Act of 1964, and 28 U.S.C. §§ 2201, 2202, in an attempt to dismantle the existing dual, segregated system of public higher education in Tennessee. The original plaintiffs were Rita Sanders, now Rita Geier, a faculty member at Tennessee A & I State University, now Tennessee State University (hereinafter "TSU"), who sued on her own behalf and on behalf of all other TSU faculty and staff members; Patrick J. Gilpin, a faculty member at the University of Tennessee, Nashville ("UTN"), who sued on his own behalf and on behalf of all other UTN faculty and staff; Harold Sweatt, then a student at Wilson County High School intending to enroll at TSU, who sued both individually and on behalf of all other similarly situated black

students; Philip Sweatt as next friend and parent of Harold Sweatt; and Petitioner Ernest Terrell, then a student at TSU, who sued on his own behalf and on behalf of all students at TSU and black residents of the State of Tennessee similarly situated.

In 1972, a group of black citizens, Raymond Richardson et al., intervened as plaintiffs. Plaintiff-intervenors Richardson et al. included a broad spectrum of persons, including former, present, and future students at Tennessee's public institutions of higher education, and persons employed on the professional faculties or staffs at such institutions. A third group of plaintiffs, Coleman McGinnis et al., representing black and white faculty members and students at TSU, intervened in 1983. Both groups of plaintiff-intervenors were represented by counsel other than counsel for the original plaintiffs.

Following institution of the action in 1968, various orders of the District Court

directed the integration of public institutions of higher education in Tennessee. Geier v. Dunn, 337 F.Supp. 573 (M.D. Tenn. 1972); Geier v. Blanton, 427 F.Supp. 644 (M.D. Tenn. 1977), affirmed sub nom Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979), cert. denied, 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117.

Beginning in 1980, motions for further relief were filed by the original plaintiffs and various groups of plaintiff-intervenors, contending that the progress of desegregating the state's public institutions of higher education and dismantling of the dual system had essentially halted, that the court-ordered merger of UTN and TSU was not succeeding, and that TSU was, in fact, resegregating. A Stipulation of Settlement, proposed by the original plaintiffs and plaintiff-intervenors Richardson et al. and McGinnis et al., was approved by the District Court

on September 25, 1984, after a hearing on the objections of the United States Department of Justice. Geier v. Alexander, 593 F.Supp. 1263 (M.D. Tenn. 1984).

By letter of October 18, 1984, directed to the District Court, Petitioner Terrell noted his unspecified objection to the Stipulation of Settlement. In motions filed November 14, 1984, Dr. Terrell requested a ruling or, in the alternative, a hearing on his still unspecified objection to the settlement, and a substitution of class counsel. On November 16, 1984, both motions were summarily denied by the District Court.

Thereafter, pursuant to a Notice of Appeal filed December 17, 1984, Dr. Terrell sought review in the United States Court of Appeals for the Sixth Circuit of the District Court's denial of Terrell's motion seeking to present objections to the Stipulation of Settlement. On appeal, plaintiffs/appellees Rita Geier et al. moved

the Court to dismiss the appeal because of the lack of standing on the part of Dr. Terrell. In an Order filed June 12, 1986, the Sixth Circuit granted the motion to dismiss Terrell's appeal. On June 25, 1986, Dr. Terrell filed a motion for an extension of time to file a mtoion for reconsideration, which motion was denied.

Dr. Terrell petitions for a Writ of Certiorari for the dismissal of his appeal by the Sixth Circuit.

REASONS FOR DENYING THE WRIT

DISMISSAL BY THE COURT OF APPEALS OF PETITIONER'S APPEAL FOR LACK OF STANDING DISTURBS NO PRINCIPLES ESTABLISHED BY THE DECISIONS OF THIS COURT OR THE CIRCUIT COURTS OF APPEALS WITH RESPECT TO THE MOOTNESS ASPECTS OF STANDING IN CLASS ACTION LITIGATION

INTRODUCTION

The single issue which is dispositive of this petition for writ of certiorari is whether, under established principles applicable to the issue of mootness in class action litigation, a named plaintif whose claim has become moot and who possesses no personal stake in the outcome of the litigation, nevertheless has standing to continue to pursue the merits of the controversy. Respondents respectfully submit that the Sixth Circuit's dismissal of Petitioner's appeal for lack of standing is fully consistent with clear and established precedent governing the issue of mootness in the class action context and that,

accordingly, the petition for writ of certiorari should be denied.

ARGUMENT

In an effort to set forth a basis for his request for issuance of a writ of certiorari, Petitioner Terrell attempts to construct an interpretation of the circumstances presented by this case which poses a conflict with this Court's decision in United States Parole Commission v. Geraghty, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). Petitioner's arguments are unpersuasive. Dismissal of Petitioner Terrell's appeal for lack of standing disturbs no principles established by the decisions of this Court with respect to the mootness aspects of standing in class action litigation.

The present case involves a situation in which it is conceded that Petitioner

Terrell, as a named plaintiff-class representative, no longer possesses a "personal stake" in the outcome of this controversy. [Petition at p. 11]. Eighteen years after the institution of this litigation, Petitioner is no longer a student at TSU, nor is he a resident of the State of Tennessee. The claims of Petitioner Terrell with respect to this action have long been moot.

This Court began to focus on the question of mootness in class actions in a series of opinions issued in 1975[1], each of which reaffirmed the general principle that the fact that the class representative's claim becomes moot before the action terminates does not automatically destroy

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1 Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); Board of School Commissioners v. Indianapolis, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975); Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

the existence of an Article III "case or controversy" necessary to justiciability. In Sosna v. Iowa, 419 U.S. 393, 402, 95 S.Ct. 553, 42 L.Ed.2d 532, 542 (1975), the Court, while reiterating the established requirement that a personal stake in the outcome of the controversy must exist, not only at the commencement of the litigation but throughout its existence, recognized that the controversy itself may exist between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot. Thus, it cannot be argued, and has never been argued in this case, that the mootness of Petitioner Terrell's claim adversely affected the continuing existence of a "live" controversy in this class action litigation.

However, the continued existence of a live case or controversy is an issue

separate and apart from the question of who is to represent the class for purposes of that controversy, a distinction recognized by both Sosna v. Iowa, 419 U.S. at 403, 42 L.Ed.2d at 542-543 and United States Parole Commission v. Geraghty, 445 U.S. at 405-407, 63 L.Ed.2d at 497. The holding of the Geraghty decision, upon which Petitioner relies, was limited to a recognition of the ability of a named plaintiff, whose claim on the merits has become moot, to nevertheless appeal from the denial of a class certification motion. 445 U.S. at 404, 63 L.Ed.2d at 496. That result was based on the Court's recognition that a plaintiff who brings a class action presents two separate issues for adjudication. One is the claim on the merits; the other is the claim that he is entitled to represent a class. A plaintiff may continue to press the class certification claim, after his claim on the merits expires, if he can be said to retain

a "personal stake" in obtaining class certification. 445 U.S. at 402-404, 63 L.Ed.2d at 494-495. Clearly, however, the narrow issue decided in Geraghty with respect to appeals from class certification denials is in no way involved in the present case. Geraghty is not controlling on the issue of the standing of a named plaintiff whose claim has become moot to continue to pursue the merits of the class claim.

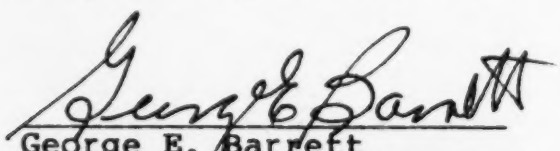
With respect to that issue, the focus shifts to the ability of the named representative to fairly and adequately represent the interests of the class. Petitioner Terrell's status as a TSU student when this action was originally filed was the sole predicate for his standing with respect to this litigation. The absence of that status, coupled with the fact that Dr. Terrell is no longer even a resident of Tennessee and has not even alleged an on-going interest in or involvement with this

litigation, demonstrates not only a lack of the requisite personal stake in the outcome on the merits but also the fundamental inadequacy of the Petitioner to represent the interests of a class to which he is no longer in any way connected.

CONCLUSION

For these reasons, the petition for a writ of certiorari to review the order of the Sixth Circuit dismissing Petitioner's appeal should be denied.

Respectfully submitted,



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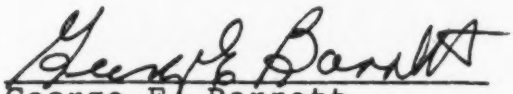
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 1986, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to Richard E. Jackson, suite 200, Jefferson Plaza, 939 Jefferson Street, Nashville, Tennessee 37208; Avon N. Williams, Jr. and Richard H. Dinkins, 203 Second Avenue, North, Nashville, Tennessee 37201; Nathaniel Douglas, Levern Younger and Miriam R. Eisenstein, Room 7732, General Litigation Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530; Aleta Arthur and John Norris, Hollins, Wagster and Yarbrough, P.C., 8th Floor, Third National Bank Building, Nashville, Tennessee 37219; Julius Chambers, Joel Berger and Theodore M. Shaw, 99 Hudson Street, 16th Floor, New York, New York 10013; and R. Stephen Doughty and Richard L. Colbert, Assistant Attorneys General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025; Carl A. Cowan, 1100 Crestview St., S.E., Knoxville, Tennessee 37915; Lewis Laska, 901 Church St., Nashville, Tennessee 37203; Julian Blackshear, Jr., 1000 Parkway Towers, Nashville, Tennessee 37219; Juanita Logan Christian, Suite 230 Hart Block Bldg., 730 W. Main St., Louisville, Kentucky 40202; Beauchamp Brogran, University of Tennessee, 810 Andy Holt Tower, Knoxville, Tennessee 37916; John Drinnon, Jr., Assistant General Counsel, Administrative Bldg., University of Tennessee, Knoxville, Tennessee 37916; and Charles Fried, Solicitor General, U.S. Dept. of Justice, Washington, D.C. 20530,

counsels for respondents. I further certify that all parties required to be served have been served.



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